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No. 09-274

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

ROGER MARK SCOTT,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

REPLY BRIEF

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[Capital Case]

QUESTIONS PRESENTED

Respondent Roger Mark Scott was convicted of participating in the 1989 murder of a 4-year-old child and sentenced to death.

After the Arizona trial court dismissed Scott's post-conviction proceedings, Scott moved to amend his dismissed petition in order to raise additional ineffective assistance of counsel claims. The trial court denied Scott's motion, finding that the applicable state procedural rule did not allow such an amendment after the initial petition had been dismissed. Scott filed a petition for review with the Arizona Supreme Court, but he did not address the merits of these new claims in the body of the petition, and only included them in an appendix.

On federal habeas corpus review, the United States Court of Appeals for the Ninth Circuit reversed a decision by the United States District Court for the District of Arizona and held that the state rule did not provide a basis for an adequate state procedural bar. Specifically, the court held that the rule was not "regularly followed or 'consistently applied' by the Arizona state courts," based on one Arizona Court of Appeals decision addressing a different issue—whether a state trial court improperly denied a convicted defendant's request for permission to file a *pro se* petition for post-conviction relief after his appointed counsel declined to file a petition. Additionally, the Ninth Circuit also refused to consider Scott's failure to fairly present his new ineffective assistance claims in

the body of the brief he filed with the Arizona Supreme Court, as required by state procedure.

1. Can the application of a state procedural rule be characterized as "inadequate" under the adequate-state-ground doctrine—and therefore unenforceable on federal habeas corpus review—based upon one Arizona appellate case that involved the application of a different rule to different factual and procedural circumstances? *See Beard v. Kindler*, 2009 WL 273318, No. 08–992 (February 2, 2009) (asking this Court to identify the proper inquiry to be conducted in determining the "adequacy" of a state rule) (argued before this Court on November 2, 2009).

2. Can a federal habeas court refuse to consider a state's procedural requirement that issues be raised in the body of a brief, rather than in an appendix, in determining whether a petitioner has fairly presented his claims to the state's courts? *See Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769, 1780 (2009) (a petitioner must "properly raise his claims in state court"); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) ("Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.").

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SUMMARY OF ARGUMENT

Scott's argument, that the Ninth Circuit correctly found that the district court erred in holding that Arizona Rule of Criminal Procedure 32.6(d) constitutes an adequate and independent state procedural bar to federal habeas corpus merits review of his claims, is erroneous. Contrary to his assertion, the state court clearly and expressly invoked the current version of the state rule in denying his motion to file an amended petition for post-conviction relief after his post-conviction relief proceedings had been dismissed. Moreover, the state court's construction of Rule 32.6(d), that a pleading cannot be amended once the underlying proceedings have been dismissed, is logical and is similar to this Court's construction of Federal Rule of Civil Procedure 15. Regardless, the Ninth Circuit's parsing of the state court's language, in order to support its conclusion that the state court applied the incorrect version of state law, is contrary to this Court's jurisprudence that a habeas reviewing court must presume that the state court knew and followed the appropriate state law. Furthermore, the Ninth Circuit lacked jurisdiction to question the state court's finding that Arizona law did not permit amendment of Scott's petition once the underlying proceedings had been dismissed, because a state court's interpretation of a state rule is binding upon a federal court sitting in habeas corpus review.

Contrary to Scott's complaints, Petitioner's arguments are directly based upon the facts of this case. Petitioner is asserting that the Ninth Circuit's quantitative analytical methodology into the question of adequacy is flawed, both in its general application, as well as in the manner it was applied in Scott's case. Similarly, Scott misapprehends Petitioner's argument regarding what it believes to be "unfair" concerning the Ninth Circuit's analysis. Petitioner does not object to the fact that procedural default is an affirmative defense that must be proved

by a state; rather, what is unfair in the Ninth Circuit's methodology is its requirement that a state must provide cases showing that a rule is well-understood and regularly followed in order for it to be considered as adequate basis for an independent state bar. If a rule is well-understood and regularly followed, a state will likely not be able to meet this requirement because in such circumstances there may well be no reported decisions concerning the rule for the state to cite to prove that the rule is in fact well-understood and regularly followed.

Scott's case is similar to *Beard v. Kindler*, No. 08–992, because both cases concern state rules interpreted by state courts. Moreover, the cases are additionally linked because the petitioner in *Beard*, as does Petitioner here, contends that the inquiry into adequacy is far better served by an analysis focusing on whether a state procedural rule provides a petitioner with adequate notice so that he may conform his conduct to it. The state court here did not use Rule 32.6(d) as a subterfuge or device to deprive Scott of any federal right, nor did the state court's logical construction of the rule impose some type of new, unforeseeable bar which served to retroactively affect the rational conduct Scott needed to pursue in order to be in compliance with the rule.

Contrary to Scott's assertion, Petitioner's contention that a state post-conviction relief petitioner must present and argue his claims in the body of his petition for review, rather than in an appendix, is not "mischaracter[izing]" Arizona law. There is nothing in the cases cited by Scott that limit their application to opening briefs on direct appeal. The Arizona Rules of Criminal Procedure, which govern both direct appeals and collateral post-conviction review, require that claims be raised and argued in appellate briefs, and petitions for review, respectively.

Finally, Scott's argument, that "[t]he issue before the Arizona Supreme Court was the lower court's error in denying Scott's request to file the amended petition, not the merits of the claims raised in that amended petition," proves Petitioner's point. As Scott admits, the merits of his ineffective assistance claims were never at issue in the Arizona courts—that is why, contrary to the finding of the Ninth Circuit, they are unexhausted.

ARGUMENTS

I

A COMMON-SENSE PROCEDURAL RULE SHOULD NOT BE CHARACTERIZED AS "INADEQUATE" UNDER THE ADEQUATE-STATE-GROUND DOCTRINE — AND THEREFORE UNENFORCEABLE ON FEDERAL HABEAS CORPUS REVIEW — BASED SOLELY ON THE INTERPRETATION OR APPLICATION OF A DIFFERENT RULE BY ONE OTHER STATE COURT TO DIFFERENT FACTUAL AND PROCEDURAL CIRCUMSTANCES.

Scott contends that the Ninth Circuit correctly found that the district court erred in holding that Arizona Rule of Criminal Procedure 32.6(d) constitutes an adequate and independent state procedural bar to federal habeas corpus merits review of his claims. Specifically, Scott argues that the state court did not clearly and expressly invoke a state procedural rule in denying his motion to file an amended petition for post-conviction relief after his post-conviction relief proceedings had been dismissed.

Scott adopts the Ninth Circuit's finding that "it appears that the [state court] judge relied on an earlier version of Rule 32.6(d), which prohibited a post-conviction court from allowing the filing of an amended petition after the first petition had been dismissed." *Scott v. Schriro*, 567 F.3d 573, 581 (9th Cir. 2009). However, this finding is clearly not supported by the record. In citing Rule 32.6(d), the state court noted that it was "authorized, *upon a showing of good cause*, to permit a defendant to amend a petition for post-conviction relief before a dispositive order issues." (Petitioner's Appendix ("Pet.App.") D–2, emphasis added.) This clearly indicates that the state court was relying upon the current version of the Rule, which specifically references "good cause;" the earlier version of the Rule contains no such reference. Moreover, the state court's finding that Rule 32.6(d) does not apply to circumstances in which the underlying proceedings have been dismissed is not based upon the former version of the Rule; rather, as the state court specifically explained, to hold otherwise "would be contrary to the underlying purpose of Rule 32 and [would be] inconsistent with its procedures." (Pet.App.D–2.) To characterize this explanation as a veiled reference to former Rule 32.6(d) is not only contrary to the plain words used by the state court, it is also not supported by logic—this Court has similarly construed Federal Rule of Civil Procedure 15 to allow amendments to pleadings *while the underlying proceedings are pending*. *See Mayle v. Felix*, 545 U.S. 644, 655 (2002) (Federal Rule of Civil Procedure 15 . . . allows pleading amendments with 'leave of court' any time *during a proceeding*.") (emphasis added). Regardless, the Ninth Circuit's painful attempts to parse the state court's language in order to support its conclusion that the state court applied the incorrect version of state law is contrary to this Court's jurisprudence that a habeas reviewing court must presume that the state court knew and followed the appropriate state law. *See Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584

(2002). Moreover, the Ninth Circuit lacked jurisdiction to question the state court's finding that Arizona law did not permit amendment of Scott's petition once the underlying proceedings had been dismissed. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.")

Thus, contrary to Scott's protestations, the state court clearly and expressly invoked a state procedural rule in denying Scott's motion to file an amended petition for post-conviction relief.

Scott next complains that Petitioner is asking this Court to replace "decades of procedural default jurisprudence" with a new analysis "that has no relevance to the facts of this case." To the contrary, Petitioner's arguments are directly based upon the facts of this case. Petitioner is squarely challenging the Ninth Circuit's decision that the state procedural rule in question failed to provide a sufficient basis for an adequate and independent state procedural bar. Specifically, as fully set out in its Petition for Writ of Certiorari, Petitioner is asserting that the Ninth Circuit's quantitative analytical methodology into the question of adequacy is flawed, both in its general application, as well as in the manner it was applied in Scott's case. Contrary to Scott's suggestion, Petitioners are not arguing that 28 U.S.C. § 2254(d) expressly applies to the doctrine of procedural default. Rather, Petitioner's argument is that the Ninth Circuit's action in rejecting the state court's interpretation of state law, and replacing it with its own interpretation, is contrary to the role comity plays in both pre- and post-AEDPA habeas jurisprudence, as exemplified not only in the AEDPA's provisions relating to deference, but in this Court's continuing habeas jurisprudence, as represented by *Bell v. Cone*, 543 U.S. 447, 455 (2005); *Parker v. Dugger*, 498 U.S. 308, 314–15

(1991), and *Walton*, 497 U.S. at 653. (*See* Petition for Writ of Certiorari at 9–10.) Similarly, Scott misapprehends Petitioner's argument regarding what it believes to be "unfair" concerning the Ninth Circuit's analysis. Petitioner does not object to the fact that procedural default is an affirmative defense that must be proved by a state; rather, what is unfair in the Ninth Circuit's methodology is its requirement that a state must prove that a rule is well-understood and regularly followed in order for it to be considered as adequate basis for an independent state bar. Placing such a burden on a state leads to a Catch-22 situation—because a rule is well-understood and regularly followed, there likely will be no reported decisions concerning it, and therefore the state will not be able to prove that the rule is well-understood and regularly followed.

Scott's contention that Petitioner is inappropriately attempting to link his case with *Beard v. Kindler*, No. 08–992, argued before this Court on November 2, 2009, is without merit. Both cases concern state court interpretations of state procedural rules. Moreover, assuming the Arizona rule at issue somehow provides an avenue for amending a dismissed petition upon a showing of good cause, the state court's ruling denying amendment in the instant case would be on all fours with *Beard*. *Compare Beard v. Kindler*, 2009 WL 273318, *1 (Petition for Writ of Certiorari, Feb. 2, 2009) (Question Presented: "Is a state procedural rule automatically "inadequate" under the adequate-state-grounds doctrine—and therefore unenforceable on federal habeas corpus review—*because the state rule is discretionary rather than mandatory*?) (emphasis added) *with* (Pet.App.D–2) (Rule 32.6(d) allows amendment, while the underlying proceedings are pending, upon a showing of "good cause"). Moreover, the cases are additionally linked because the petitioner in *Beard*, as does Petitioner here, contends that the inquiry into adequacy is far better served by an analysis focusing on whether a state

procedural rule provides a petitioner with adequate notice so that he may conform his conduct to it. *Beard*, 2009 WL 273318, at *9. Additionally, with regard to this latter contention, Scott's complaint that Rule 32.6(d), as construed by the state court, did not provide him with adequate notice so that he could conform his conduct to it is not meritorious. As this Court's decision in *Mayle* demonstrates, common sense alone dictates that a pleading cannot be amended when there are no underlying proceedings pending. In short, the state court did not use Rule 32.6(d) as a subterfuge or device to deprive Scott of any federal right, nor did the state court's logical construction of the rule impose some type of new, unforeseeable bar which served to retroactively affect the rational conduct Scott needed to pursue in order to be in compliance with the rule.

II

A FEDERAL HABEAS COURT SHOULD CONSIDER A STATE'S PROCEDURAL REQUIREMENTS, RELATING TO PROPER ISSUE PRESENTATION, IN DETERMINING WHETHER A PETITIONER HAS FAIRLY PRESENTED HIS CLAIMS TO THE STATE'S COURTS.

Petitioner's contention that a state post-conviction relief petitioner must present and argue his claims in the body of his petition for review, rather than in an appendix, does not "mischaracter[ize]" Arizona law. While it is true that the cases cited by Petitioner all involve direct appeal proceedings, there is nothing in those cases that limit their application to opening briefs on direct appeal. The Arizona Rules of Criminal Procedure, which govern both direct appeals and collateral post-conviction review, require that claims be raised and argued in appellate briefs, and petitions for review, respectively. *See*

Ariz.R.Crim.P.31.13(c); 32.9(c)(1)(ii–iv). The fact that, unlike a direct appeal opening brief, a petition for review is limited to 20 pages is clearly inconsequential—if a state petitioner was allowed to raise and argue claims solely in his appendix, which is not subject to page limitation, then the page limitation regarding the length of the petition for review would be rendered meaningless. For similar reasons, the fact that a petition may incorporate a document in the appendix by reference cannot mean that issues need not be raised and argued in the petition itself.

Finally, Scott notes:

> Understandably, of course, Scott did not argue the merits of his ineffective assistance-of-counsel claims in the body of his petition for review because the superior court had denied his request to file the amended petition in which those claims were raised. The issue before the Arizona Supreme Court was the lower court's error in denying Scott's request to file the amended petition, not the merits of the claims raised in that amended petition.

(Brief in Opposition, at 17.) This proves Petitioner's point. As Scott admits, the merits of his ineffective assistance claims were never at issue in the Arizona courts—that is why, contrary to the Ninth Circuit's finding, they are unexhausted.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted

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